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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/699,771	11/04/2003	Marlene C. Schwarz	12013/53907	5897

23838 7590 10/12/2005

KENYON & KENYON
1500 K STREET NW
SUITE 700
WASHINGTON, DC 20005

EXAMINER	
LAMB, BRENDA A	

ART UNIT	PAPER NUMBER
1734	

DATE MAILED: 10/12/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/699,771	Applicant(s) SCHWARZ ET AL.	
	Examiner Brenda A. Lamb	Art Unit 1734	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 19 September 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: *6-7,26,28,29,32-34 and 39-40 over the art of record is maintained*.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. ☐ Other: _____.

Continuation of 11. does NOT place the application in condition for allowance because:
Applicant's argument that Bloomstrom fails to teach the spray nozzles coat the shrimp is found to be non-persuasive. In order to effectively treat the surfaces of the shrimp, the material from the Bloomstrom spray nozzles coat or cover the surfaces of the shrimp. Further, in regard to applicant's argument regarding the combination of Bloomstrom, Leidner et al and Tso et al as non-analogous art is found to be non-persuasive. Leidner et al is applied to teach that antioxidant are known in the art as antioxidants and Tso et al is applied to teach canthaxanthin is a known antioxidant. Bloomstrom teaches his series of spray nozzle which apply canthaxanthin on the shrimp but fails to teach the canthaxanthin. However, it would have been obvious Bloomstrom spray nozzles apply a therapeutic coating since canthaxanthin is a known antioxidant as taught by Tso et al column 10 at lines 11-13 and antioxidant are a type of therapeutic material as taught by Leidner et al (see Leider et al at column 8 line 64 to column 9 line 6). Applicant's argument that Bloomstrom fails to teach coating of a coating implant is found to be non-persuasive. Note it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ 2d 1647 (1987). "[A]pparatus claims cover what a device is, not what a device does." Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990). Therefore, Bloomstrom apparatus is capable of coating medical implants since it teaches every positively claimed element of the apparatus.

Applicant's argument that Wurster and Zingerman each fail to teach an apparatus for coating a medical implant as set forth at paragraph 23 of the specification rather teach coating tablets and tablets or pills is found to be non-persuasive. First of all, it is noted that the instant specification and claims are not limited to the types of medical implants disclosed at page 23 of the specification and applicant's specification cites the devices as mere examples. Second of all, for the sole purpose (enphasis added) to address applicant's argument that pills/tablets are not medical implants, it is known to use tablets/pills as an implant for medical purposes as for example as disclosed by Wiegerinck 5,405,324 at column 1 lines 4-9. Therefore, the examiner maintains that Wurster as modified by Zingerman teaches an apparatus for coating medical implants which includes the following elements: a coating area sized to accept medical implants for implantation within the body of a patient; a source of therapeutic coating having an exit point in fluid communication with the coating area or a means for supplying a therapeutic coating; a screen (elements 20,22 and 24) positioned at the bottom of the coating area; means for forcing the medical implants to move above the screen or suspend the medical implants during the coating process as shown in Figure 1 which includes a nozzle.

Applicant's argument that Alkan et al fails to teach the vibration source is capable of generating compressible pressure waves of compressible fluid containing enough energy to lift a medical device located on the screen away from the screen is found to be non-persuasive. First of all, it has been held that the recitation that an element is "capable of" performing a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. In re Hutchinson, 69 USPQ, 138. Second of all, it is noted as set forth in the last office action that the vibration source includes elements 4-9 and the effect of the vibration of the speaker 8 and tube 4 upon the air in tube 4 generates pressure waves of compressible air and such waves of compressible fluid is capable of containing enough energy to lift a medical device dependent on frequency and amplitude chosen by the user using the disclosed amplifier.

Applicant's arguments that the combination of Alkan et al and Wurster is improper since coating from a nozzle which is positioned beneath the amplifier would be blocked from reaching the tablets/pills by the amplifier is found to be non-persuasive. As set forth in the last office action, the vibration source includes elements 4-9 and the recitation that the nozzle is positioned beneath the vibration source does not require the nozzle be positioned beneath the entire vibration source assembly (elements 4-9) rather is open to nozzle being positioned beneath at least a portion of the vibration source assembly (elements 4-9). Therefore, it would have been obvious to modify the Alkan et al by arranging the coating nozzle beneath a portion of the Alkan et al vibration source which includes tube 4 as well as beneath the screen 3 since Wurster shows doing so for the taught advantage of coating the tablets as they travel upwardly and out of contact with each other.

Applicant's argument that Carter is directed to a sterilizing unit and not a coating unit for coating medical implants is found to be non-persuasive. The examiner maintains that Carter teaches the design of an apparatus for treating a medical devices comprising: a treating area for treating the medical devices; a vibration source which includes element 18; a source of treating material, includes elements 70, 72, 74 and 76, having an exit point, opening at end of pump hose 74, in fluid communication with the treating area; and a screen 42 positioned at the bottom portion of the coating area wherein vibration in the treating area occurs in a manner so as to cover or coat the surfaces of the medical device thereby the treating material reads on a coating material and treating area reads on a coating area. Carter teaches the contents of the chamber which includes the medical devices, arranged above the screen, is agitated or moved by the vibration from the vibration source thereby reading on applicant's claimed means for forcing medical device to move above the screen during the coating process. Carter's source of treating/coating material is an anti-microbial liquid for medical devices which reads on a source of therapeutic material since Leidner et al teaches at column 8 line 64 to column 9 line 6 that therapeutic materials include a variety of materials including anti-microbial materials. Carter's coating area is sized to accept medical instruments and therefore are sized to accept a medical instrument which includes a medical implants for implantation within the body of a patient.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brenda Lamb whose telephone number is (571) 272-1231. The examiner can normally be reached on Monday and Wednesday thru Friday with alternate Tuesdays off.

Brenda Adele Lamb

BRENDA A. LAMB
PRIMARY EXAMINER